Office-Supreme Court, U.S.
FILED
FEB 16 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1182

IN THE

Supreme Court of the United States

October Term, 1984

THE BOEING COMPANY and
LOGISTICS SUPPORT CORPORATION,

Petitioners,

v.

THE ISLAMIC REPUBLIC OF IRAN and
THE AIR FORCE OF
THE ISLAMIC REPUBLIC OF IRAN

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a challenge to the validity of Fed. R. App. P. 4, which in seventeen years has never been questioned by any court, such an "exceptional case" that it justifies review despite petitioners' failure to raise the issue below?

2. Is Fed. R. App. P. 4(a)(5) an unlawful expansion of federal court jurisdiction because it contains a broader definition of "excusable neglect" than an earlier procedural statute that it superseded?

3. Was the court of appeals required to hold that the district court abused its discretion by finding that a sudden incapacitating illness of counsel constituted excusable neglect under Fed. R. App. P. 4(a)(5)?

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STATEMENT OF THE CASE

The appeal in this case, now pending in the Ninth Circuit Court of Appeals, is from a $70,000,000 default judgment entered in favor of the Boeing Company and Logistics Support Corporation (jointly, "Boeing") against The Islamic Republic of Iran and The Air Force of the Islamic Republic of Iran (jointly, "Iran"). The default was ordered as a sanction for Iran's failure to furnish adequate discovery responses at a time when Iran was in a state of internal revolution, at war with Iraq and restricted by the United States government from having representatives in this country. The judgment was for the full amount of damages Boeing claimed, $48,000,000, plus $22,000,000 in prejudgment interest, on various claims Boeing asserted against Iran. (A-57-59)[1]

The district court's judgment was entered on November 1, 1983. (A-59) Because it feared that filing an immediate notice of appeal might jeopardize efforts to settle the action, Iran planned to file its notice of appeal on the last day, December 1, 1983. Accordingly, the only attorney then representing Iran, Thomas G. Smith ("Smith"), prepared and signed the notice of appeal to be sent by Federal Express on November 30 for delivery at the district court on December 1, 1983. Unfortunately, on November 30, 1983, Smith became so violently ill with diarrhea and vomiting that, as the district court found, he was physically and mentally incapacitated. He was in bed with this illness until Sunday, December 4, 1983, and did not return to work until Monday, December 5, 1983. As a result, Iran's notice of appeal was not filed by the December 1, 1983, deadline.

Iran then filed a timely motion to extend the time to appeal, relying on Fed. R. App. P. 4(a)(5), which authorizes the district court to grant an extension for "excusable neglect." The district court found that Smith's "physical and mental

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[1] The district court allowed Boeing to file and prosecute several permissive counterclaims even though Iran's original complaint had already been dismissed and despite the United States' agreement in the Algerian Accords to "terminate all litigation" in United States courts between United States nationals and Iran, and to refer all such litigation instead to the special neutral Iran-United States Claims Tribunal.

incapacity" constituted excusable neglect and granted Iran's motion. (A-31-34) Pursuant to the extension ordered by the district court, Iran filed a timely notice of appeal on January 4, 1984. (A-91) Boeing cross-appealed from the order extending Iran's time. (A-93)

On January 17, 1984, Boeing filed an "emergency motion" to dismiss Iran's appeal on the ground that Smith's illness "did not constitute excusable neglect." The court of appeals' motions panel, without hearing argument, and without setting forth any standard of review, found the extension "unwarranted," and granted Boeing's motion. (A-7-8)

On rehearing, after further briefing and argument, the same panel unanimously reversed itself. (A-1-6) This time it reviewed the district court's finding that Smith's incapacitating illness justified an extension of time under the appropriate abuse of discretion standard. (A-3) It held:

> We conclude that illness of counsel entrusted with the filing responsibility may amount to extraordinary circumstances when the illness is so physically and mentally disabling that counsel is unable to file the appeal and is not reasonably capable of communicating to co-counsel his inability to file.

(A-3)[2] Accordingly, the district court's order was affirmed, and Iran's appeal was reinstated to be heard on the merits. Boeing then filed a petition for rehearing, which was denied. (A-63) Iran's opening brief was filed with the Ninth Circuit on January 25, 1985.

In sum, Boeing has tried four times to convince the courts below to find that Iran was not entitled to an extension of time to appeal the $70,000,000 default judgment against it. It has failed, and the appeal is proceeding on the merits. Now Boeing asks this Court to review the question of the extension of time and to hold that the appeal was required to be dismissed after all.

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[2] Thus, Boeing's statement that the Court of Appeals "held that 'excusable neglect' was conclusively established by Mr. Smith's brief illness at home" (Pet. 7) seriously overstates the actual holding. (*See* A-3)

SUMMARY OF ARGUMENT

1. Boeing's principal contention is that the "excusable neglect" standard of Fed. R. App. P. 4(a)(5) impermissibly expands "jurisdictional limitations established by Congress" in 28 U.S.C. § 2107. This Court should refuse to review this contention for two reasons:

a. Boeing never raised this issue in either the district court or the court of appeals, and it has failed to demonstrate that this is an "exceptional case" justifying resolution by this Court in the first instance; and

b. 28 U.S.C. § 2107 is a procedural statute that codified a former procedural rule; it is not a grant of subject matter jurisdiction. Thus, by the explicit terms of 28 U.S.C. § 2072, Fed. R. App. P. 4(a)(5) supersedes its procedural predecessor.

2. The district court applied the proper standard in finding excusable neglect and extending Iran's time to appeal; the court of appeals held that the district court's decision was not an abuse of discretion. This Court should not review this discretionary decision based upon factual findings, especially because Boeing's factual contentions are baseless.

REASONS FOR DENYING THE WRIT

I.

BOEING'S CONTENTION THAT FED. R. APP. P. 4(a)(5) AND THE DECISION BELOW CONFLICT WITH 28 U.S.C. § 2107 IS WITHOUT MERIT

Boeing's principal contention is that the decision below and Fed. R. App. P. 4(a)(5) condone an unlawful expansion of federal court jurisdiction in conflict with 28 U.S.C. § 2107. This contention is baseless, and Boeing did not even raise it in either court below.

A. Boeing Failed To Raise The Point In Either Court Below.

Not once in Boeing's repeated and passionate challenges to Iran's extension of time to file the notice of appeal, did it

question the validity of Fed. R. App. P. 4(a)(5). Indeed, in the hundreds of pages of briefs it filed in support of its arguments in the courts below, Boeing never even mentioned 28 U.S.C. § 2107, the statute which is now the cornerstone of its petition for certiorari. This, alone, is a good ground for denying the writ.

This Court has repeatedly held that it will exercise jurisdiction over federal claims not raised below only in "exceptional cases." *See Hoover* v. *Ronwin,* ____ U.S. ____, 104 S.Ct. 1989, 1998 (1984); *Heckler* v. *Campbell,* ____ U.S. ____, 103 S.Ct. 1952, 1958 n.12 (1983); *Delta Air Lines, Inc.* v. *August,* 450 U.S. 346, 362 (1981); *McGoldrick* v. *Compagnie Generale Transatlantique,* 309 U.S. 430, 434 (1940); *Duignan* v. *United States,* 274 U.S. 195, 200 (1927).

Boeing's challenge to Fed. R. App. P. 4(a) is not an exceptional case. Rule 4(a) (or its predecessor, Civil Rule 73) has been in effect for seventeen years. Countless extensions of time to file notices of appeal have been granted since then, and many more will be granted in the future. Opponents of any one of those future extensions may challenge the propriety of Rule 4(a) in the proper manner, raising that challenge both in the district court and in the court of appeals before seeking review in this Court.[3] There is simply no reason for this Court to address Boeing's new theory without the benefit of any analysis of the question by either the district court or the court of appeal.[4]

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[3] This Court has denied certiorari in at least one case involving a conflict between Rule 4 and 28 U.S.C. § 2107. *See Griffith Co.* v. *NLRB,* 545 F.2d 1194, 1197 n.3 (9th Cir. 1976), *cert. denied sub nom Waggoner* v. *Griffith Co.,* 434 U.S. 854 (1977).

[4] Ironically, Boeing criticizes the decision below for adding to the number of appeals "when the dockets of the courts of appeals and the Supreme Court are already seriously overcrowded." (Pet. 13) At least the appeal "added" by the decision below promotes a resolution of the controversy on the merits. Boeing's petition, however, also adds to this Court's docket, but it does so to avoid a decision on the merits and it violates the policy against piecemeal review and the policy against raising issues that were not presented to the courts below.

B. Fed. R. App. P. 4(a)(5) Supersedes Its Procedural Predecessor, 28 U.S.C. § 2107.

Boeing argues that the extension of time to file the notice of appeal approved by both courts below is invalid because it was based on the "excusable neglect" standard of Fed. R. App. P. 4(a)(5) rather than the "excusable neglect based on a failure . . . to learn of the entry of a judgment . . ." standard of 28 U.S.C. § 2107. Boeing has it backwards.

Rule 4(a)(5) was promulgated pursuant to 28 U.S.C. § 2072, which empowers this Court to prescribe general rules of practice and procedure for the lower federal courts. Section 2072 provides that "[a]ll laws that conflict with such rules shall be of no further force or effect after such rules have taken effect." Therefore, to the extent there is a conflict between 28 U.S.C. § 2107 and Rule 4(a)(5), the expanded "excusable neglect" of Rule 4(a)(5) prevails.[5]

There is no doubt about this conclusion. Every federal court to consider the issue has held that Rule 4 supersedes any inconsistent provisions in Section 2107. *See Curacao Drydock Co.* v. *M/V Akritas,* 710 F.2d 204 (5th Cir. 1983); *Braden* v. *University of Pittsburgh,* 552 F.2d 948, 951 n. 12 (3rd Cir. 1977) (*en banc*); *Griffith Co.* v. *NLRB,* 545 F.2d 1194, 1197 n.3 (9th Cir. 1976), *cert. denied sub nom Waggoner* v. *Griffith Co.,* 434 U.S. 854 (1977); *Feeder Line Towing Serv., Inc.* v. *Toledo, P. & W. R.R. Co.,* 539 F.2d 1107 (7th Cir. 1976); *Hansen* v. *Trawler Snoopy, Inc.,* 384 F.2d 131 (1st Cir. 1967); *Cederbaums* v. *Harris,* 484 F. Supp. 125 (S.D.N.Y. 1980). *See generally* 9 J. Moore, Moore's Federal Practice ¶ 204.07 (2d ed. 1983). That should end the matter.

Boeing seeks to avoid the effect of Section 2072 by insisting that Section 2107 is a limit on federal court jurisdiction which is unlawfully expanded by the "excusable neglect" standard of Rule 4(a). This argument completely misreads the decisions of this Court.

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[5] The simple "excusable neglect" standard was adopted in the 1966 amendments to Civil Rule 73, the predecessor of Rule 4. This change became effective in 1968. In 1968, the new Federal Rules of Appellate Procedure incorporated this standard into Rule 4(a).

Although this Court has sometimes referred to the time limitations in *both* 28 U.S.C. § 2107 *and* Rule 4(a)(5) as "mandatory and jurisdictional," *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982); *Browder* v. *Director, Illinois Dep't of Corrections*, 434 U.S. 257, 264 (1978); *United States* v. *Robinson*, 361 U.S. 220, 229 (1960), these references do not mean that Section 2107 constitutes a grant of subject matter jurisdiction. Rather, the Court has simply held that since the rules themselves carefully circumscribe the permissible means of securing appellate review, courts must refuse appeals not brought in conformity with those rules:

> That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision.

United States v. *Robinson*, 361 U.S. at 229. Thus, the Court has used the word "jurisdictional" in this context, not in the Article III sense, but to emphasize that compliance with the rules is a "mandatory prerequisite to the exercise of appellate jurisdiction." *Haney* v. *Mizell Memorial Hosp.*, 744 F.2d 1467, 1472 (11th Cir. 1984); *Curacao Drydock Co.* v. *M/V Akritas*, 710 F.2d at 206-07. As Professor Moore explains,

> It is not jurisdictional in the sense of subject matter jurisdiction, for both the time limits and the circumstances in which they may be extended are fixed by the rules, and by their own terms the rules "shall not be construed to extend or limit the jurisdiction of the court of appeals as established by law." Mandatory preconditions as to the exercise of jurisdiction are often spoken of as jurisdictional, however, in the sense that absent compliance, the court can acquire no jurisdiction of the cause, through [sic] otherwise it is a case within its subject matter jurisdiction or, as it is sometimes called, "competence".

9 J. Moore, Moore's Federal Practice ¶ 204.02 [2] (2d ed. 1983).

This analysis is confirmed by *Griggs, supra,* in which the Court held that "1979 amendments [to Rule 4] avoided [a] potential conflict [between district court and appellate jurisdiction] by depriving the courts of appeals of jurisdiction in such situations." 459 U.S. at 60. If the Court were using "jurisdiction" in the strict sense urged by Boeing, Rule 4 could not have had that effect, because, as Boeing itself asserts (Pet. 11-12), the Federal Rules of Procedure may not "extend or limit the jurisdiction of the courts of appeals as established by law." Fed. R. App. P. 1(b).[6]

Indeed, even before the "excusable neglect" standard of Section 2107 was expanded in 1968, this Court recognized that "unique circumstances," beyond a party's failure to learn of entry of judgment, may justify a finding of "excusable neglect." *See Fallen* v. *United States,* 378 U.S. 139 (1964) (former Fed. R. Crim. P. 37(a)); *Thompson* v. *Immigration and Naturalization Serv.,* 375 U.S. 384 (1964) (*per curiam*) (former Rule 73); *Harris Truck Lines* v. *Cherry Meatpackers, Inc.,* 371 U.S. 215 (1962) (*per curiam*) (former Rule 73). *See also Wolfsohn* v. *Hankin,* 376 U.S. 203 (1964) (relying, without opinion, on *Thompson* and *Harris*). Obviously those decisions could not have been rendered if Boeing were correct in asserting that Section 2107 limits subject matter jurisdiction.

In sum, Boeing's argument confuses the Court's concern for compliance with procedural rules with a statutory grant of subject matter jurisdiction and seeks to invalidate a rule that for seventeen years has provided the basis for extending the time to appeal. Boeing cites no case that supports this result, and it is clearly wrong.

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[6] The Court has made clear that the Rule 1(b) restriction refers to subject matter jurisdiction. *See Mississippi Publishing Corp.* v. *Murphree,* 312 U.S. 584 (1946) (construing the comparable Fed. R. Civ. P. 83).

II.
THE DISTRICT COURT'S DISCRETIONARY FINDING OF "EXCUSABLE NEGLECT" DOES NOT WARRANT THIS COURT'S REVIEW

A. The Decision Below Neither Conflicts with the Law in Other Circuits Nor Announces New Standards

The district court found on uncontroverted facts that a sudden illness that caused counsel to be physically and mentally incapacitated constituted excusable neglect. The court of appeals held that this finding was not an abuse of discretion. Now, in an attempt to get this Court to review that discretionary factual judgment, Boeing claims that the decision below conflicts with other decisions and announces new and dangerous standards. (Pet. 13, 15) This is nonsense. The district court's finding and the court of appeals' affirmance of it are in harmony with both Rule 4(a)(5) and the cases applying it.

First, Boeing's claim that the Court of Appeals' decision "conflicts with the law in other circuits and the law established by this Court" (Pet. 13) is incorrect. This Court has held that the determination of "excusable neglect" by the district court should be accorded "great deference." *Harris Truck Lines* v. *Cherry Packers, Inc.*, 371 U.S. at 217. The courts of appeals have respected that holding, and uniformly have held that a district court's determination of "excusable neglect" will be reversed only for an abuse of discretion. *See United States* v. *Atkinson*, 748 F.2d 659, 661 (Fed. Cir. 1984); *McGarr* v. *United States*, 736 F.2d 912, 919 (3d Cir. 1984); *Campbell* v. *Bowlin*, 724 F.2d 484, 488 (5th Cir. 1984); *Meza* v. *Washington State Dep't of Social & Health Serv.*, 683 F.2d 314, 315 (9th Cir. 1982); *Benoist* v. *Brotherhood of Locomotive Eng'rs*, 555 F.2d 671, 672 n.1 (8th Cir. 1977); *Gooch* v. *Skelley Oil Co.*, 493 F.2d 366, 368 (10th Cir.), *cert. denied*, 419 U.S. 997 (1974). That is exactly the rule the court of appeals applied here; it simply held that the district court did not abuse its discretion. (App. A-3) Thus, there is no conflict in the law.

Second, Boeing's claim that the decision below is a "new interpretation of Rule 4(a)(5)" that will make late appeals "routine" (Pet. 15), is also incorrect. Obviously a determination of "excusable neglect" is dependent on the facts of the case and is not completely objective. It is clear, however, that under proper circumstances, incapacitating illness of counsel may constitute "excusable neglect" within the meaning of Rule 4(a).

In *Berman* v. *United States,* 378 U.S. 530 (1964), this Court held that the sudden illness of appellant's counsel on the last day to appeal did not constitute excusable neglect under the narrow definition then in effect. In 1966, specifically in response to *Berman,* the rule was amended to permit an extension based upon *any* excusable neglect, including illness of counsel. *See* 9 J. Moore, Moore's Federal Practice ¶ 204.13 [1.-3] (2d ed. 1983) (Rule 4(a)(5) was amended in response to *Berman); Oregon* v. *Champion Int'l Corp.,* 680 F.2d 1300, 1302 n.2 (9th Cir. 1982) (dissenting opinion) ("the Supreme Court amended the rule, in part, to avoid similarly harsh results in future cases" such as *Berman); United States* v. *Dabney,* 393 F. Supp. 529, 552 (E.D. Pa. 1975) ("the 'excusable neglect' provision of the Rule was added in 1966, in part to avoid the harsh results of cases such as *Berman* . . . . The sudden illness of counsel is clearly a circumstance covered by the 'excusable neglect' provision of the rule"). One member of the Advisory Committee that drafted the amendment to the rule wrote:

> This change was made because experience has revealed that there are a number of other situations in which tardiness is excusable and in which it is unfair to dismiss an appeal because of late filing of the notice. . . . Supreme Court decisions reveal other examples of *illness* or persons in prison in which the former rule was unnecessarily rigid.

Stern, *Changes in the Federal Appellate Rules,* 41 F.R.D. 297, 298-99 (1967) (emphasis added).

Thus, although it is difficult precisely to define "excusable neglect," it is clear that the rule was amended to overrule the "harsh" result of *Berman,* and to permit illness of counsel to satisfy the standard.

The dissent in *Berman* argued that:

> It is particularly abhorrent to think that such a rule can be enforced in the federal courts where, as here, the sole reason for cutting off the defendant's right of appeal to the Court of Appeals is the fact that, after the defendant has decided to appeal, the lawyer to whom he entrusts the duty of physically transporting his notice of appeal to the Court of Appeals fails to get it there because he is taken ill.

378 U.S. at 532 (Black J., dissenting). As a result of the 1966 rule change, that dissent is now the law. The drafters of the rule clearly intended that sudden illness of the attorney entrusted with filing the notice of appeal could constitute "excusable neglect." That is all the court of appeals held in this case.

B. Both Courts Below Properly Rejected Boeing's Factual Contentions.

Boeing's factual attacks on the decision below are equally insubstantial. Both the district court and the court of appeals considered Boeing's arguments and rejected them.

The court of appeals did not impose a new requirement upon Boeing to show that it would be prejudiced if Iran's appeal were allowed to proceed on the merits. (Pet. 15-16) All the court of appeals did, in the course of determining that denying the appeal would result in injustice, was to note that Boeing did not even claim that it would be prejudiced if the appeal were allowed. (App A-6)

Boeing also attacks the court of appeals decision, claiming that it allowed the extension of time without requiring an explanation of the inaction of Iran's other attorneys of record. (Pet. 16-18) This argument ignores the undisputed fact that Smith was the attorney solely responsible for filing the notice, and he was incapacitated to the point that he could not even

alert other counsel to the need for action. (App. A-3).[7] Moreover *Berman* itself also involved multiple attorneys who presumably could have replaced the one taken ill, yet the *Berman* situation is precisely what Rule 4(a)(5) was amended to accommodate.

Boeing also argues that Mr. Smith's plan to file the notice of appeal himself without obtaining local Seattle counsel's signature would violate the district court's local rules (Pet. 18), and that the court of appeals' rejection of this argument because "Iran had gotten away with a prior violation of the rule earlier in the case" is "incredible." (Pet. 18) This afterthought argument is inconsistent with Boeing's own conduct, and Boeing didn't even raise it in the district court.

First, if Iran "got away" with violating the rule earlier in the case, Boeing itself was Iran's principal accomplice. The pretrial order containing the stipulations that are the sole basis for Boeing's enormous judgment was prepared by Boeing for Mr. Smith alone to sign on behalf of Iran. Boeing did not even provide a signature line for local counsel to sign in compliance with the local rules.

Second, Boeing never objected to Smith's practice of signing Iran's pleadings in the district court. Obviously a claim based on an asserted violation of a court's own rules ought to be presented to that court in the first instance. Boeing, however, did not even mention this theory until the case was in the court

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[7] This, of course, distinguishes the cases Boeing relies upon for its claim that the existence of more than one attorney should have precluded a finding of excusable neglect. (Pet. 17) None of those cases involved an incapacitating illness, and two of them (*Buckley* v. *United States*, 382 F.2d 611 (10th Cir. 1967), *cert. denied*, 390 U.S. 997 (1968); *Flett* v. *W.A. Alexander & Co.*, 302 F.2d 321 (7th Cir.), *cert. denied*, 371 U.S. 841 (1962)) simply affirmed findings by the district court that there was no excusable neglect under the former, more restrictive standard. Those cases do not stand for the proposition that under Rule 4(a)(5) the illness of counsel can never constitute excusable neglect when there is another attorney who has participated in the case.

of appeals. Under these circumstances it is not at all "incredible" that the court of appeals rejected Boeing's attempt to throw out an appeal from a $70,000,000 judgment on such a technicality.

Nor is there anything to Boeing's claim that the decision below failed to consider Iran's alleged lack of due diligence and good faith. (Pet. 18-20) Iran postponed filing the notice of appeal to facilitate settlement efforts.[8] Unfortunately, as in *Berman,* counsel was suddenly taken ill on the last day. If Boeing's argument were valid there would always be a lack of "due diligence" unless counsel actually tried to file the notice of appeal on the first possible day and every day thereafter. That is unrealistic and would make the 30-day period meaningless.[9]

There is even less to Boeing's argument that Iran acted in bad faith in initiating the appeal. (Pet. 20) It is difficult even to understand what this means. Obviously Iran seeks a reversal of the judgment against it — that is what the appeal process is for and it is not bad faith to invoke it. Boeing apparently is complaining about Iran's assertion in the Iran-United States Claim Tribunal that the United States courts do not have jurisdiction over this action. But where is there any bad faith in that? The Claims Tribunal is the final arbiter of that question, and Iran could hardly be expected to abandon its position in that forum.[10]

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[8] Boeing's attempt to impugn Iran's motives by characterizing its decision to wait to file the notice as "an effort to achieve a perceived tactical advantage" in the litigation (Pet. pp. 18, 19) is baseless. The only facts in the record show that Iran simply believed settlement would be facilitated if the appellate process were not underway. That is a good motive, not a bad one.

[9] Boeing's complaint about the short delay after the time had run before Iran filed its motion for an extension of time makes even less sense. Rule 4 itself defines what is due diligence in this regard, and it provides a clear 30-day period within which the motion had to be made. Iran filed well within that period. Boeing's reliance on cases decided under Fed. R. Civ. P. 60(b) is misplaced, because there is no such period provided in that rule.

[10] Boeing knows better. It filed the same claims on which the judgment in this case is based in the Claims Tribunal as well. If protecting ones rights in both forums is bad faith, then Boeing is equally guilty.

Finally, Boeing challenges a comment made by the district court in the hearing on Iran's motion, claiming that the comment was an improper basis for granting Iran's motion. Boeing attaches undue significance to the court's comment. In its order granting Iran's motion, the court considered the proper factors and applied the correct standard. The court did consider counsel's conduct throughout the case, not because of concern about malpractice liability, but because such conduct was relevant to the credibility of counsel's claim of excusable neglect. (A-33-34)

Boeing is merely asking this Court to review the facts, and to reach a different conclusion than the lower courts. That is not the proper role for this Court.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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February 15, 1985